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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Colleen Harrington,

Plaintiff

v.

State of Nevada, ex rel. Nevada System of
Higher Education, College of Southern
Nevada,

Defendants

Case No.: 2:18-cv-00009-APG-PAL

**Order Granting Defendant's Motion to
Dismiss**

[ECF No. 8]

Colleen Harrington sued her employer, the College of Southern Nevada (CSN), for violations of the Fourteenth Amendment under 42 U.S.C. § 1983, Title VII, Nevada Revised Statutes § 613.340, and the Equal Pay Act/Fair Labor Standards Act (FLSA).¹ CSN moves to dismiss the complaint.² Harrington voluntarily dropped her § 1983 claim in response to CSN's motion, so I grant the motion to dismiss that claim. Because the State of Nevada, and thus CSN,³ is immune from suit under the FLSA, I dismiss that claim with prejudice. I also find that Harrington has failed to plead sufficient facts to state a claim for retaliation, so I dismiss that claim without prejudice.

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¹ ECF No. 1.

² ECF No. 8.

³ CSN is a branch of the State University governed by a Board of Regents, as created in the Nevada Constitution, Art. 11, sec. 4. It is sued by naming the State of Nevada, ex rel. Board of Regents of the Nevada System of Higher Education on behalf of the College of Southern Nevada. Nev. Rev. Stat. §§ 396.020, 41.031(2). The named defendant in this case is the State of Nevada, but I refer to the defendant as CSN because that is the entity alleged to have caused Harrington's injury.

1 **I. BACKGROUND**

2 Harrington is a tenured professor at CSN.⁴ In August 2016 she filed a charge of
3 discrimination with the Equal Employment Opportunity Commission (EEOC) alleging sex
4 discrimination.⁵ Just over a year later, she filed a second charge of discrimination alleging
5 retaliation for filing her first EEOC complaint.⁶ Harrington received a notice of right to sue for
6 the retaliation charge on October 17, 2017,⁷ and filed her complaint in this case on January 3,
7 2018.⁸

8 Harrington alleges that after she filed her initial charge of discrimination with the EEOC,
9 CSN “engaged in a pattern of retaliation and harassment” that included:

- 10 • Denial of tenure in retaliation for filing an EEOC complaint
- 11 • Refusal or delay in using her textbook
- 12 • Exclusion from meetings
- 13 • Refusal to communicate regarding work-related issues
- 14 • Hostile demeanor, and
- 15 • Other acts of retaliation and discrimination⁹

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17 Harrington further asserts that she was paid less than her male peers for certain work, or not paid
18 at all for work for which male peers were paid.¹⁰

19 ⁴ ECF No. 1 at ¶ 38.

20 ⁵ *Id.* at ¶ 15.

21 ⁶ *Id.* at ¶¶ 16, 18.

22 ⁷ *Id.* at ¶ 17.

23 ⁸ ECF No. 1. Harrington also filed an amended complaint (ECF No. 16) along with her
opposition to the motion to dismiss. The amended complaint was not timely filed to qualify as
an amendment as a matter of right under Federal Rule of Civil Procedure 15(a)(1). Harrington
did not obtain CSN’s consent or leave of the court to file it under Rule 15(a)(2). Therefore, the
original complaint remains the operative complaint.

⁹ ECF No. 1 at ¶ 18.

¹⁰ *Id.* at ¶ 19.

Harrington’s complaint asserts three causes of action: violations of the Equal Protection Clause of the Fourteenth Amendment under § 1983; retaliation in violation of Title VII and § 613.340; and violation of the Equal Pay Act/FLSA. CSN moves to dismiss all three claims. CSN contends that it is entitled to sovereign immunity from Harrington’s FLSA claim because it is an arm of the State. CSN also contends that it is not a “person” who can be sued under § 1983. Finally, CSN argues that Harrington’s complaint does not allege enough facts to support her allegations of retaliation and therefore fails to state a claim for relief.¹¹ In Harrington’s opposition, she abandons her § 1983 claim. As to her claims of retaliation and violations of the FLSA, she argues that Congress abrogated states’ sovereign immunity for FLSA claims and that she has pleaded enough facts to support her retaliation claim.

II. DISCUSSION

A properly pleaded complaint must provide a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹² While Rule 8 does not require detailed factual allegations, it demands more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action.”¹³ The complaint must set forth coherently “who is being sued, for what relief, and on what theory, with enough detail to guide discovery.”¹⁴ “Factual allegations must be enough to rise above the speculative level.”¹⁵ To survive a motion to

¹¹ ECF No. 8 at 3–4.

¹² FED. R. CIV. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹⁴ *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1995).

¹⁵ *Twombly*, 550 U.S. at 555.

1 dismiss, a complaint must “contain[] enough facts to state a claim to relief that is plausible on its
2 face.”¹⁶

3 District courts must apply a two-step approach when considering motions to dismiss.¹⁷
4 First, the court must accept as true all well-pleaded factual allegations and draw all reasonable
5 inferences from the complaint in the plaintiff’s favor.¹⁸ Legal conclusions, however, are not
6 entitled to the same assumption of truth even if cast in the form of factual allegations.¹⁹ Mere
7 recitals of the elements of a cause of action, supported only by conclusory statements, do not
8 suffice.²⁰ Second, the court must consider whether the factual allegations in the complaint allege
9 a plausible claim for relief.²¹ A claim is facially plausible when the complaint alleges facts that
10 allow the court to draw a reasonable inference that the defendant is liable for the alleged
11 misconduct.²² Where the complaint does not permit the court to infer more than the mere
12 possibility of misconduct, the complaint has “alleged—but it has not shown—that the pleader is
13 entitled to relief.”²³ When the claims have not crossed the line from conceivable to plausible, the
14 complaint must be dismissed.²⁴ “Determining whether a complaint states a plausible claim for
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18 ¹⁶ *Iqbal*, 556 U.S. at 696 (internal quotation marks and citation omitted).

19 ¹⁷ *Id.* at 679.

20 ¹⁸ *Id.*; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247–48 (9th Cir. 2013).

21 ¹⁹ *Iqbal*, 556 U.S. at 679; *Brown*, 724 F.3d at 1248.

22 ²⁰ *Iqbal*, 556 U.S. at 678.

23 ²¹ *Id.* at 679.

24 ²² *Id.* at 663.

25 ²³ *Id.* at 679 (internal quotation marks and citation omitted).

26 ²⁴ *Twombly*, 550 U.S. at 570.

1 relief will . . . be a context-specific task that requires the [district] court to draw on its judicial
2 experience and common sense.”²⁵

3 **A. Harrington’s § 1983 claim is dismissed with prejudice.**

4 Harrington withdraws her § 1983 claim in her opposition to CSN’s motion to dismiss.²⁶
5 Therefore, I dismiss that claim with prejudice.

6 **B. CSN is entitled to sovereign immunity for Harrington’s FLSA²⁷ claim.**

7 CSN argues that it is entitled to sovereign immunity because it is an arm of the State of
8 Nevada. Harrington responds that Congress abrogated sovereign immunity through the text of
9 the FLSA.

10 “Under the Eleventh Amendment, a state is immune from suit under state or federal law
11 by private parties in federal court absent a valid abrogation of that immunity or an express
12 waiver by the state.”²⁸ Congress can abrogate state sovereign immunity if it both
13 (1) unequivocally expresses its intent to do so, and (2) acts pursuant to a valid exercise of
14 power.²⁹

15 The parties agree that Congress expressed intent to abrogate state sovereign immunity
16 through the FLSA, which explicitly includes state employees, public agencies, and other state
17 employers in its definitions.³⁰ The Supreme Court has held that similar references to the “State”

18 ²⁵ *Iqbal*, 556 U.S. at 679.

19 ²⁶ ECF No. 19 at 6.

20 ²⁷ Harrington’s complaint titles this claim as “Violation of the Equal Pay Act/Fair Labor
21 Standards Act.” ECF No. 1. The Equal Pay Act is the common title for the 1963 amendments to
the FLSA. Harrington’s Equal Pay Act claim is therefore the same as her FLSA claim.

22 ²⁸ *Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1115–16 (9th Cir. 2000), *abrogated on other*
grounds as recognized by Hibbs v. Dep’t of Human Res., 273 F.3d 844, 853 n.6 (9th Cir. 2001).

23 ²⁹ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

³⁰ See 29 U.S.C. §§ 203(d), (e)(2)(C), and (x).

1 in conjunction with language authorizing suit in federal court were sufficient to constitute intent
2 to abrogate.³¹

3 Consequently, the question is whether Congress acted pursuant to a valid exercise of
4 power. In *Seminole Tribe of Florida v. Florida*, the Supreme Court held that Congress cannot
5 abrogate state sovereign immunity by means of its Article I Commerce Clause powers.³² In that
6 case, the Court expressly overruled *Pennsylvania v. Union Gas*,³³ a case in which the Court held
7 that the Commerce Clause gave Congress power to abrogate state sovereign immunity.³⁴ “The
8 Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used
9 to circumvent the constitutional limitations placed upon federal jurisdiction.”³⁵ Therefore,
10 absent waiver, a state is immune from suit in federal court for violations of the FLSA.

11 A waiver of sovereign immunity will be found “only where stated ‘by the most express
12 language or by such overwhelming implications from the text as [will] leave no room for any
13 other reasonable construction.’”³⁶ Under Nevada Revised Statutes § 41.031(3), the State of
14 Nevada has explicitly refused to waive its sovereign immunity conferred under the Eleventh
15 Amendment. CSN is thus immune from suit under the FLSA in federal court, so I dismiss
16 Harrington’s FLSA claim.

18 ³¹ *Seminole*, 517 U.S. at 56–57.

19 ³² *Id.* at 72–73.

20 ³³ *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989).

21 ³⁴ *Seminole*, 517 U.S. at 66.

22 ³⁵ *Id.* at 72–73. *See also*, *Quillin v. State of Or.*, 127 F.3d 1136, 1138 (9th Cir. 1997) (“Like the
23 statute at issue in *Union Gas*, [the] FLSA was passed pursuant to the Commerce Clause,” and
absent waiver “federal courts lack jurisdiction to review” FLSA claims brought against the State
or its agencies.).

³⁶ *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213
U.S. 151, 171 (1909)).

1 **C. Harrington fails to state a claim for Title VII and § 613.340 retaliation.**

2 Harrington alleges that after she filed the 2016 EEOC charge for discrimination, she was
3 subjected to “a pattern of retaliation and harassment,” including denial of tenure, refusal to use
4 her textbook, exclusion from meetings, refusal to communicate about work matters, hostile
5 demeanor, and “other acts of retaliation and discrimination.”³⁷

6 Title VII prohibits retaliation by making it unlawful “for an employer to discriminate
7 against any of [its] employees or applicants for employment . . . because [she] has opposed any
8 practice made an unlawful employment practice by this subchapter.”³⁸ To establish a prima facie
9 case of retaliation, “a plaintiff must show (1) involvement in a protected activity, (2) an adverse
10 employment action and (3) a causal link between the two.”³⁹ Because discrimination and
11 retaliation claims under Nevada law are substantially similar to federal claims under Title VII, I
12 will focus on Title VII.⁴⁰

13 CSN argues that Harrington fails to allege an adverse employment action and a causal
14 connection between the filing of her EEOC complaint and the complained-of activity.⁴¹ “An
15 action is cognizable as an adverse employment action if it is reasonably likely to deter employees
16 from engaging in protected activity.”⁴² “To show the requisite causal link,” a plaintiff must

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18 ³⁷ ECF No. 1 at ¶ 18.

19 ³⁸ 42 U.S.C. § 2000e-3(a).

20 ³⁹ *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000).

21 ⁴⁰ *See Pope v. Motel 6*, 114 P.3d 277, 281 (Nev. 2005) (relying on Title VII cases to interpret
22 § 613.340).

23 ⁴¹ ECF No. 8 at 6. CSN asks me to take judicial notice of the publicly available meeting minutes
for the Nevada System of Higher Education Board of Regents in which Harrington was granted
tenure. Even if I considered the meeting minutes, they do not support dismissal. Harrington
suggests that her damages arose from an earlier denial of tenure, therefore the fact that she was
eventually awarded tenure does not prevent her from possibly stating a claim.

⁴² *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000).

1 allege facts “sufficient to raise the inference that her protected activity was the likely reason for
2 the adverse action.”⁴³ A plaintiff’s complaint must also contain sufficient facts to allow for an
3 inference “that the defendant was aware that the plaintiff had engaged in protected activity.”⁴⁴

4 Harrington has failed to sufficiently plead a claim for Title VII retaliation. Her complaint
5 is sparse, lacking plausible factual allegations that would lead to an inference of a causal
6 connection between the filing her initial EEOC complaint and the complained-of actions by
7 CSN. She simply alleges that the complained-of actions happened after she filed her initial
8 EEOC complaint. She gives no dates for any of the alleged retaliatory conduct, making it
9 impossible to determine whether the events were close enough in time to infer causation.
10 Finally, Harrington’s complaint is silent as to whether or when CSN knew about her initial
11 EEOC complaint. Absent factual allegations giving examples of retaliatory conduct, dates, or a
12 time range for the complained-of activity, Harrington’s complaint does not state a plausible
13 claim for retaliation. Therefore, I dismiss Harrington’s retaliation claim but grant her leave to
14 amend if she can assert additional facts to state a plausible claim.

15 If Harrington amends her complaint, she also should plead additional facts supporting her
16 allegations of adverse employment actions. Harrington’s allegations of denial of tenure and the
17 refusal to use her textbook are sufficiently pleaded. But her other allegations, such as “exclusion
18 from meetings,” “refusal to communicate,” “hostile demeanor,” and “other acts of retaliation,”⁴⁵
19 are too vague and conclusory to show plausible entitlement to relief. If Harrington wishes to
20 pursue those allegations, she must plead additional facts to support them.

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22 ⁴³ *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).

23 ⁴⁴ *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003), *opinion*
amended on denial of reh’g, 2003 WL 21027351 (9th Cir. May 8, 2003).

⁴⁵ ECF No. 1 at ¶ 18.

1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that **the defendant's motion to dismiss (ECF No. 8) is**
3 **granted.** Plaintiff Colleen Harrington's § 1983 claim is dismissed with prejudice. Her FLSA
4 claim is dismissed without prejudice. Her Title VII and § 613.340 retaliation claim is dismissed
5 without prejudice. Plaintiff may file an amended complaint by September 28, 2018. The failure
6 to do so will result in the closing of this case.

7 DATED this 6th day of September, 2018.

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11 ANDREW P. GORDON
12 UNITED STATES DISTRICT JUDGE
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